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REGULATORY AUTH.

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May 29, 2002

OFFICE OF THE  
EXECUTIVE SECRETARY

David Waddell, Esq.  
Executive Secretary  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, TN 37243-0505

Re: *Complaint of Access Integrated Network, Inc. Against BellSouth  
Telecommunications, Inc., and  
Complaint of XO Tennessee, Inc. Against BellSouth Telecommunications,  
Inc.*

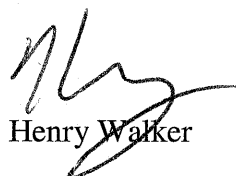
Docket No. 01-00868

Dear David:

Please accept for filing the original and thirteen copies of a Brief filed on behalf of  
Complainants in the above-captioned proceeding. Copies have been forwarded to parties.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By:   
Henry Walker

HW/nl  
c: Guy Hicks, Esq.  
Parties

5/30/02

**BEFORE THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE**

In Re: Complaint of Access Integrated Network, )  
Inc. Against BellSouth Telecommunications, Inc. )  
Complaint of XO Tennessee, Inc. Against ) Docket No. 01-00868  
BellSouth Telecommunications, Inc. )  
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**BRIEF OF COMPLAINANTS ON ISSUES OF DISCRIMINATION AND NOTICE TO  
DISTRICT ATTORNEY GENERAL**

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As requested by the Tennessee Regulatory Authority, the Complainants<sup>1</sup> submit the following brief regarding (1) whether the Hearing Officer's finding that BellSouth Telecommunications, Inc. ("BellSouth") has violated the prohibition against unjust discrimination, T.C.A. § 65-4-122(a), is supported by sufficient evidence in the record and, (2) if so, whether the District Attorney General is the proper party to pursue a violation of that statute.<sup>2</sup>

**I. Sufficiency of Evidence**

There is one issue on which the parties agree: the facts of this case are "undisputed." *See BellSouth Petition for Clarification or Reconsideration*, at p. 1, footnote 2. As the Hearing Officer found, and as BellSouth admitted, about ten percent of BellSouth's business customers in Tennessee were enrolled in the "Select" program and received non-tariffed rebates, discounts and other benefits in exchange for the purchase of regulated telecommunications services. Charging some customers more than others for the same service constitutes "unjust

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<sup>1</sup> The Complainants include Access Integrated Networks, Inc., XO Tennessee, Inc. and ITC^DeltaCom Communications, Inc., which intervened after the original complaints were filed.

<sup>2</sup> *See* transcript of TRA conference of May 21, 2002.

discrimination” as defined in Section 122(a). BellSouth has no colorable defense and, thus far, has not raised any objection to the Hearing Officer’s findings.

In BellSouth’s most recent filing, styled as a “Petition for Clarification or Reconsideration,” the carrier does not challenge any of the conclusions in the Initial Order but observes in a footnote that there could be some “alternative outcomes” which would be “appropriate.” The company never explains, however, what those “alternative outcomes” might be. Given BellSouth’s admission that some Tennessee customers were promised “three months of free service” in exchange for subscribing to BellSouth’s Key Customer Discount Program (tr. 137, 178-179), the company’s acknowledgement that those promises of free service were “contrary to the terms of the applicable [BellSouth] tariff” (*Answer of BellSouth*, paragraph 3), and BellSouth’s confession that the offers reflected a “mistake in judgment” by BellSouth (tr. 199), it is hard to imagine what other “outcomes” the Hearing Officer could have reached. Presumably in recognition of the awkwardness of the company’s position, BellSouth offers in the same pleading to “pay in full the fine imposed by the Hearing Officer” and “not seek review of the Initial Order” if the Hearing Officer would clarify that the Initial Order only applies to programs similar to the Select Program and not to other, unspecified BellSouth marketing plans which also link the purchase of regulated and non-regulated services.<sup>3</sup> BellSouth’s offer is tantamount to an admission that the Hearing Officer’s findings are correct.

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<sup>3</sup> The Hearing Officer did, in fact, note in a subsequent order that the Initial Order applied only to the facts before her concerning the Select Program, but she properly declined to address the applicability of her ruling to other BellSouth programs which are not part of the record in this case.

In sum, there appears to be no argument to be made (at least not any argument that BellSouth is willing to make) against the Hearing Officer's conclusion that BellSouth is guilty of "unjust discrimination" in violation of T.C.A. § 65-4-122(a).<sup>4</sup>

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<sup>4</sup> In the proceedings before the Hearing Officer, BellSouth argued that the company did not discriminate among customers because the Select Program was (and is) available to all business customers who met the eligibility requirements of the program. See *Initial Order*, at 26.

In response to that argument, the Hearing Officer found that the "record indicates that there were customers who did not receive notification of the Select Program and, therefore, could not become or seek to become members." *Initial Order*, at 27. She further noted that, even if some potentially eligible Select members received such notice, no notice was provided to business customers who were ineligible to join the program. *Initial Order*, at 27-28.

While the Hearing Officer's conclusions concerning customer notification are amply supported by the record, they are unnecessary to the conclusion that BellSouth is guilty of unjust discrimination as defined by T.C.A. § 65-4-122(a). "Unjust discrimination" occurs when a public utility charges one customer more than another, similarly situated customer for the same service. If one customer receives a non-tariffed kickback and, therefore, is charged less than the other, that constitutes "unjust discrimination" and is a *per se* violation of the statute. It does not matter whether the second customer is aware of the illegal payment or whether the other customer knew that he could also receive such a payment. Unless every customer is charged the same rate as every other customer, BellSouth is guilty of "unjust discrimination" as defined by the statute. Even if BellSouth could somehow prove that every business customer in the state had actual knowledge of the Program throughout its existence, BellSouth would still be in violation of the statute for charging some customers, but not others, less than the tariffed rates.

BellSouth's argument that the Program was available to all customers confuses the discrimination issue with the tariff filing requirement. "By filing tariffs, utilities provide notice to all customers of the rates for and nature of the service tariffed." *Initial Order*, at 26. Furthermore, the tariff filing requirement "provides the Authority with a mechanism with which to determine whether discrimination has occurred." *Id.* In other words, tariffs, not advertisements or web sites, provide legal "notice" to the public of the terms and conditions upon which service is made available. By approving those tariffs, the Authority determines that terms and conditions are "just and reasonable" and, therefore, not discriminatory.

As the Hearing Officer noted, the tariff filing requirements and the prohibition against discrimination are separate, but interrelated concepts. *Initial Order*, at 26. It is possible, in theory, to violate the tariff filing requirement without violating the discrimination statute. (BellSouth, for example, could give all customers the same rebates but neglect to tariff the rebates.) But it is not possible for a utility to be found guilty of unjust discrimination unless the utility has either failed to file the appropriate tariffs or failed to follow them. That is what occurred in this case. Because the rebates and discounts given to Select members were not tariffed, those rebates and discounts violated Section 122(a). The issue of customer notification is irrelevant.

## II. Notice to District Attorney General

Under state law, the Tennessee Regulatory Authority “shall report all such violations [of the anti-discrimination statute] with the facts in its possession to such district attorney general and request the district attorney general to institute the proper proceedings.” T.C.A. § 65-3-120. The statute is not permissive; it is mandatory. Moreover, it is “the duty” of the Authority “to ensure that . . . all laws of this state over which they have jurisdiction are enforced and obeyed, that violations thereof are promptly prosecuted, and all penalties due the state are collected.” T.C.A. § 65-1-213.

In short, if the TRA agrees with the Hearing Officer that BellSouth has engaged in unjust discrimination, the TRA has no choice but to refer the facts of this case to the District Attorney General<sup>5</sup> for prosecution. It then becomes the duty of the District Attorney General “to bring suit in the name of the state” against BellSouth to collect the fines (\$500 to \$2,000 per violation) for violation of the anti-discrimination statute and to deposit such amounts in the state treasury. The record in this case indicates that, through the end of last year, BellSouth had made 4,581 rebates to Tennessee customers. *See* Attachment 1.D filed in response to XO’s Second Data Request. BellSouth has continued to make rebates since that time. BellSouth could therefore potentially be required to pay from \$2.5 million to \$10 million in total fines to the state treasury.

The TRA’s question to the parties also asks, by implication, whether someone other than the District Attorney General has the power to pursue a violation of T.C.A. § 65-4-122(a).

The statute does create, in subsection (e), a private right of action so that anyone injured by a violation of the statute may bring suit against a public utility for violating the prohibition

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<sup>5</sup> Since BellSouth’s Tennessee headquarters is located in Nashville, the referral should be made, initially at least, to the District Attorney General for Davidson County.

against discrimination. The statute is silent, however, as to whether the TRA itself may impose the \$500 to \$2000 fines for violation of that statute.

The Hearing Officer's Order does not address the issue of whether the TRA can directly penalize a carrier for a violation of T.C.A. § 65-4-122(a). Arguably, such direct enforcement may be inconsistent with the mandatory requirement, previously discussed, that such cases be referred to the District Attorney General for collection of those fines. The Complainants, however, have not requested that the TRA impose those fines, and take no position as to whether the TRA has the power to do so.

Respectfully submitted,

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By: 

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## CERTIFICATE OF SERVICE

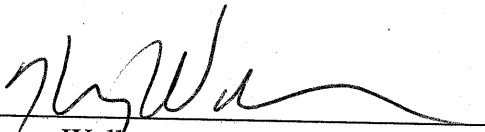
I hereby certify that a true and correct copy of the foregoing has been forwarded via fax or hand delivery and U.S. mail to the following on this the 29<sup>th</sup> day of May, 2002.

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